

Saturday, February 20.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

BENNET CLARK v. BENNET CLARK.

Husband and Wife—Divorce—Adultery—Evidence—Husband Living Apart from Wife—Intimate Association with Unmarried Lady—Opportunity—Uncorroborated Evidence of One Witness to Facts Inferring Adultery—Absence of Familiarities—Innocent Friendship or Illicit Love.

In an action of divorce for adultery at the instance of a wife living apart from her husband, the evidence showed that throughout the three years in which the spouses were living apart, the husband, a middle-aged man, was on terms of intimate friendship with an unmarried lady of 27, the daughter of an English vicar; that they stayed at several hotels and hydropathics together; that they corresponded regularly throughout the whole period, he addressing her in his letters as "Dear E." or "Dearest E." while she addressed him as "Dear D." or "Dearest D."; that all their letters were destroyed on receipt; that at the various hotels and hydropathics at which they stayed they were regarded either as intimate friends or lovers; that the defender's association with the co-defender was not in any way clandestine or the subject of remonstrance on the part of her family, whom he sometimes visited, or on that of her friends, to whom he was introduced; that no familiarities were ever witnessed at any of the places at which they stayed, and that, with the exception of certain incidents, which rested on the unsupported and doubtful evidence of one witness, viz., that he had occasionally found them together in the defender's sitting room with the door locked, their conduct throughout their association, though indiscreet and open to grave suspicion, was not inconsistent with innocent friendship.

Held that adultery had not been proved, and defender assolized.

Opinions that had any familiarities been proved the result might have been otherwise.

Expenses—Husband and Wife—Divorce—Adultery—Unsuccessful Action by Wife Possessing Independent Means—Defender's Conduct Indiscreet and Open to Grave Suspicion.

Circumstances in which a husband who had successfully defended an action of divorce for adultery at the instance of his wife, a lady of ample means, was awarded one half of his expenses in the Outer House and full expenses in the Inner House.

On 23rd March 1907 Mrs M. L. Tennent or Bennet Clark, otherwise Clark Tennent, residing at Cammo House, Cramond,

brought an action of divorce for adultery against her husband, David Bennet Clark, 23 Straiton Place, Portobello.

The facts are given in the opinion (*infra*) of the Lord Ordinary (SALVESEN), who on 20th November 1907 assolized the defender and found him entitled to one half of his expenses.

Opinion.—"The parties to this action of divorce were married in 1887. The defender was at that time a bank clerk, and his whole income from his salary and some private investments was about £300. The pursuer, on the other hand, was the daughter of a sheep farmer in Australia, who after amassing a considerable fortune had returned to Scotland. She received from her father an allowance which was sufficient, along with the defender's income, to enable the spouses after a year's experience in lodgings to live in Belgrave Place, Edinburgh. On the death of the pursuer's father in December 1890 she succeeded to a sum of between £70,000 and £80,000, and the following year the parties removed to Cammo House, near Cramond, of which they took a lease. In February 1898 the pursuer purchased Cammo House with her own funds, and still resides there.

"The parties lived fairly happily together for a short time, but in 1891 there seems to have been a serious disagreement, to which I shall afterwards refer, but which was ultimately patched up. Later there was a great deal of domestic friction, which ended in the defender leaving the pursuer on 16th June 1903, or, as he says, being turned out of the house by her. Since then the parties have been living separate.

"The grounds of divorce are the defender's alleged infidelity with a Miss Hodgson, commencing in the summer of 1904, and continuing until the time of the action. During the greater part of this period the pursuer was travelling abroad, and her evidence has therefore no relation to the specific charges which she makes against her husband. She has, however, introduced two matters with the view of placing the defender's character in an unfavourable light, and although these have only a remote bearing on the true issue of the case, they have bulked largely in the evidence, and I think it right that I should express my opinion with regard to them.

"The first relates to the form of a will in his own favour which the defender wrote out and asked the pursuer to sign at the time when they were engaged. The pursuer refused to do so, and says that the marriage was very nearly broken off in consequence, and she suggests that the draft will is evidence of the mercenary motives which prompted the defender to marry her. The defender's explanation is that he had delivered to the pursuer certain stocks worth about £800, and that his reason for asking the pursuer to sign the will in question was to secure that these stocks should come back to himself in the case of her predecease. Certainly there is no other evidence (unless the fact that he married a lady with prospects may be taken as such)

of the defender having acted in a mercenary manner. Under his marriage contract with the pursuer no provision was made in his favour from her estate. By this deed the defender is taken bound to provide his widow with an alimentary annuity of £200, besides securing to her, by payment of the annual contribution, the pension payable from the Widows' Fund of the Office-bearers and Clerks of the Bank of Scotland, while the pursuer's whole estate is conveyed to trustees for payment to her of the annual income exclusive of all her husband's rights. Moreover, shortly after the marriage the defender transferred to the joint names of the pursuer and himself practically all his remaining investments, and these were only recovered by him after litigation. I think it quite probable therefore that the defender's motive was what he states, although it is odd that he did not realise how useless such a will would have been to secure his object. One thing is certain, that the pursuer has retained the money which she received from the defender before marriage, while also carefully preserving the form of will which he submitted to her and which was obviously kept to support (if occasion required) an unfavourable construction as to his motives in marrying her.

"The other matter relates to a confession of alleged immorality which the defender signed in 1891. It appears from the pursuer's evidence that sometime prior to this confession she had become suspicious of the defender's conduct with other women. She says that she asked for an explanation and received none at first, but that ultimately the defender wrote a full confession. In cross-examination she repudiates the idea that the confession was in any way extorted by her, and represents that it was because her husband had a guilty conscience and was very unhappy, and wished her forgiveness, that he voluntarily wrote out this confession and handed it to her at Pitlochry, where she was then staying. The defender, on the other hand, says that his wife entertained quite unreasonable and unfounded suspicions of his fidelity, that she refused to live with him unless he made a full confession, and that as he was very fond of her and found it impossible to dislodge from her mind the conviction that he had been immoral, he ultimately agreed to write out and sign the confession for no other reason than to humour her and to induce her to resume conjugal relations. The story is a strange one, but after considering the pursuer's and defender's evidence, along with the intrinsic evidence to be derived from the confession itself and a number of letters on the same subject written by the defender in 1891, I have come to prefer his account. The incidents upon which the pursuer founds were in themselves so trivial as not to suggest to any except an unreasonably suspicious woman that she had any good cause of complaint against her husband, and there was absolutely no reason why the defender should have signed this confession or written the abject and fulsome

letters on which the pursuer founds except that which he gives. Nor can I account for a written confession having been given at all except on the footing that the pursuer insistently demanded it with the view of obtaining a hold upon her husband to be used against him should there be any subsequent breach in their conjugal relations. The letter to Mr Meldrum, the pursuer's uncle, which bears to have been written by the defender at her request, and the possession of which by the pursuer is not explained, instead of strengthening the pursuer's case, appears to me to afford intrinsic evidence as to the general correctness of the defender's account. It is really of small moment, however, what opinion one forms on this part of the case, for the alleged immorality prior to 1891 can have little bearing on the charges that are now made. If the confession and letters are treated as sincere, it is, at all events, plain that the defender must have cherished an extravagant affection for his wife, and have consented to abase himself to the uttermost in order to obtain her permission to live with her, while it is difficult to resist the inference that a lady who required to be written to in such a strain as a condition of her forgiving his delinquences, must have been of a highly exacting disposition.

"The Helensburgh incident has still less bearing on the question of infidelity, and all that I need say with regard to it is that I am quite satisfied that no plot was entered into by the defender and his brothers to secure the person and property of the pursuer, although I have no doubt the pursuer is firmly convinced of the correctness of the inferences which she drew at the time, and upon which she has since acted.

"I come now to the relations of the defender and Miss Hodgson, which form the subject-matter of the action, and I shall deal in the first instance with the facts that are admitted.

"Miss Hodgson in 1904 was a lady of twenty-seven, the daughter of an English vicar. She resided at Brighton with her widowed mother, who was more or less an invalid, in a small self-contained house in Montpellier Terrace. Between 2nd and 30th August 1904 she was a visitor at the Edinburgh Hydropathic. Two friends of hers from Brighton—General Allen and Miss Stirton—had previously been at the same hydropathic, and were known by her to be there in August, and this had largely influenced her choice as to where she was to spend her holidays. The defender, who had for more than a year been living apart from his wife, came to the hydropathic on 4th August, and remained there till the 30th. Some days after his arrival he was introduced to Miss Hodgson by a mutual friend—Miss Wigney—and by her was introduced to General Allen and Miss Stirton. Very soon after the introduction the defender and Miss Hodgson became very friendly. The defender required to be at the bank every day, but on his return in the evening to the hydropathic he spent most of his time with Miss Hodg-

son and her friends. On one occasion he took her to the theatre, and on another they went for a drive together in an open cab. They were in the habit of strolling about the grounds, and playing billiards together. When Miss Hodgson and her two friends left on the 30th August for Dunblane Hydropathic the defender came and spent his week-ends there on at least two occasions. After leaving Dunblane, Miss Hodgson went to Peebles Hydropathic, where the defender continued to visit her, although he did not reside in the house. Before they parted they arranged to correspond with each other; and from that time until the raising of the action they regularly wrote letters to each other once or twice, and sometimes even thrice, a-week. In these letters the defender addresses Miss Hodgson as 'Dear Elinor' or 'Dearest Elinor' (probably at a somewhat later date), and signed himself 'Yours ever D.,' or 'D. B.,' while she addressed him as 'Dear D.' or 'Dearest D.,' and signed herself 'Yours ever E.' At Christmas 1904 the defender paid a visit to Brighton and spent a day or two there, staying at a hotel, but having his lunch and dinner at Mrs Hodgson's house when they were not dining elsewhere, as they did on Christmas Day with General Allen. These visits to Brighton were repeated every six weeks or so, while Miss Hodgson was living at home. In the summer of 1905 Miss Hodgson and her sister, who is the Superior of an Anglican Sisterhood, were in Edinburgh for a night, and went on to Ballater. The defender having asked and obtained permission, accompanied them there. The sisters returned to Edinburgh, and Miss Hodgson went to the Edinburgh Hydropathic, where General Allen and Miss Stirling were again staying. The defender tried to obtain a room at the hydropathic, but was unsuccessful—he being informed that it was full. During the week from 16th to 23rd August 1905, in which Miss Hodgson stayed at the hydropathic, the defender was a frequent visitor, avowedly for the purpose of being in Miss Hodgson's society. When she left and went to the Braid Hills Hotel, she was again visited by the defender. In the end of August Miss Hodgson and her two Brighton friends went to Wemyss Bay Hydropathic, where they stayed for about three weeks. The defender followed them there, and lived some time in the same hydropathic. On 20th September 1905 Miss Hodgson took up her quarters at the Queen's Bay Hotel, where the defender had been since January 1905 a regular resident. She remained for two or three weeks there. During that time she sat at the same small table in the public dining-room with him. She was in the habit of meeting him occasionally at the station on his return from the office. They cycled together once or twice, and went to the theatre together at least once. There were no friends of Miss Hodgson's staying at the Queen's Bay Hotel. On three occasions at all events she was in the defender's sitting-room when one or more

other persons were present, and she admits having taken his arm when out walking. When Miss Hodgson returned south the correspondence between the parties was resumed; and as before he paid occasional visits to Brighton, being content to undergo the inconvenience of the long railway journey for the pleasure of being in her society a single day. In August 1906 Miss Hodgson visited Harrogate, where she stayed at the Cairn Hydropathic. The defender tried to obtain a room in the hydropathic, but, as it was full, took a bedroom in the Dirleton Hotel. He took all his meals, however, at the hydropathic, and he and Miss Hodgson were constantly in each other's company. This visit lasted a week. In the beginning of October of the same year Miss Hodgson went back to Harrogate and took a room at the Dirleton Hotel. She expected that the defender would also come there, as he had arranged to do; but on 6th October she received a telegram that he was seriously ill. She at once proceeded to Edinburgh, where the defender was lying in a home, being treated for an attack of pleurisy, and she regularly called and saw him in his bedroom. The defender was sufficiently recovered by the 17th of October to travel, and he and Miss Hodgson went back to Harrogate and took up their residence in the Dirleton Hotel. The day after their arrival Miss Hodgson was in turn taken ill and was confined to bed or to a couch till 27th October, when she and the defender left Harrogate together and proceeded to Edinburgh, where Miss Hodgson went to reside in a home in Forres Street. She remained there till 21st November 1906, and during this time she was visited almost daily by the defender, who brought her jellies and perfume from time to time. Miss Hodgson left the Forres Street home on 21st November and resided at the Queen's Hotel, St Colme Street, till 13th January 1907, where she was again regularly visited by the defender. She then transferred her residence to the Braid Hills Hotel, where she remained until the 20th of February, when she went to Harrogate and resided at the Cairn Hydropathic and afterwards in private rooms in Trafalgar Place. At all these places she was regularly visited by the defender. From the time, however, when she took ill, about the 18th of October, Miss Hodgson was in a very delicate state of health, and she has remained in that condition ever since, her evidence having to be taken on commission, as she was certified to be unable to travel to Edinburgh.

"The defender and Miss Hodgson explain their constant association on the footing that they had formed a very close friendship. Miss Hodgson says that they were drawn together at first by their both being unhappy. Both parties admit that they never corresponded so frequently with any other person as they did with each other, and their mutual attachment is nowhere more remarkably displayed than in their anxiety for each other's state of health, and the attention the one paid to the other, when suffering from illness.

“Such friendships as this between a middle-aged man living apart from his wife and a comparatively young woman are apt to be unfavourably construed, and are perhaps usually not of an innocent nature. Nevertheless, it would be rash to affirm that they do not occasionally occur without any immorality, or to infer that the parties had been living in immoral relations from the mere fact that in the large majority of cases such friendships may be highly dangerous. The law, accordingly, as I understand it, demands that there shall be proof of such familiarity as is inconsistent with any other view than that of a guilty connection, and I accordingly proceed to examine the evidence adduced for the pursuer with a view to considering whether such a connection has been proved.

“The evidence relating to the first period (2nd to 31st August 1904) adds very little to what the defender admits. Mr Bell, the manager of the Edinburgh Hydropathic, says that the defender and Miss Hodgson were constantly in each other's company, and that this attracted his attention, but he observed nothing to justify any interference on his part. Helen Robb, a linen maid, formed the opinion that they were sweethearts, and says there was talk amongst the servants about their relations, but she has nothing to go upon except the fact that they were so much together. Robert Black, boots, formed the same impression, and speaks to their having been twice out late at night, and to his opening the door for them when, as he thought, they had been at the theatre. On one of these occasions he says that they went up arm in arm together; and Evan Paterson, the lift boy, then fourteen years of age, adds that on several occasions, once in the evening and twice or thrice in the afternoon, they ascended the lift together and got out on the third floor or fourth storey, where Miss Hodgson's bedroom was. He says, further, that he observed them going along the corridor in the direction of her bedroom. The fact that both the defender and Miss Hodgson deny that this ever took place is strongly founded upon against them. But I can well imagine that this may have occurred without either of them remembering the circumstances after an interval of three years. Assuming it to be true, however, I see no adequate reason for inferring that they went to her bedroom as the pursuer suggests; and I may say that I think it very unlikely that between persons in their rank of life, living in a public place, they should have got the length of having immoral intercourse after so short an acquaintance. It is also worthy of note that during the whole of this period Miss Hodgson's friends, General Allen and Miss Stirton, were living in the hydropathic; and although she was not under their protection in any sense, they would certainly have been the first to notice if any undue intimacy had sprung up between the defender and her. On record and in the evidence there is a covert attack upon General Allen and Miss Stirton which I

think has completely failed. It may be that it was a little unconventional for these two people, who were not relatives, although friends of long standing, to be travelling together from one hydropathic to another; but the General was a man of seventy and Miss Stirton a lady over forty; and there is not a scrap of evidence to show that their friendship was otherwise than of the most correct description.

“The next period founded on is the week in August 1905 when Miss Hodgson again stayed at the Edinburgh Hydropathic. On this occasion also General Allen and Miss Stirton were staying there, and had been from the 28th of July. On the same day that Miss Hodgson arrived the defender applied to Mr Bell for a room and was promised one; but Mr Bell having observed the defender and Miss Hodgson sitting at the extreme end of the upper grounds together after dark, and knowing that the defender was a married man, thought that there was something improper in such familiarity; and not merely refused the defender a room in the hydropathic, but at the end of the week informed Miss Hodgson that her room was required. There is no doubt that Mr Bell did this because he had formed an opinion that the intimacy between the defender and Miss Hodgson was being talked about in the Hydropathic, of the reputation of which he was very jealous. I am inclined also to think that the dispute between Miss Stirton and another guest called Miss Barbour, who had suggested that Miss Stirton had passed under the name of Allen at some other hotel—and for which Miss Barbour was compelled to apologise—made an unfavourable impression on Mr Bell's mind, as he regarded Miss Hodgson as being of the same party, although it is not very clear from Mr Bell's evidence when this incident took place. During the week at the hydropathic nothing else was noticed beyond the fact that the defender and Miss Hodgson were very much together; and as the servants by this time knew that the defender was a married man they were disposed to put an uncharitable construction on his frequent visits.

“I pass over the intervening visits to the Braid Hills Hotel, &c., because no evidence is adduced as to the parties' relations there, and consider the evidence with regard to the stay at the Queen's Bay Hotel. Now I cannot but think that it was in the highest degree indiscreet for a young unmarried lady to take up her quarters in this hotel for no other reason than that her most intimate male friend was living there at the time, and it is difficult to believe that the defender did not realise that this constant association with Miss Hodgson was calculated to compromise her reputation. At the same time, there seems to have been an idea that Miss Stirton would also come to this hotel, and the bedrooms of the defender and Miss Hodgson were in entirely different parts of the building. Some friends of the defender were staying there, and were examined as witnesses, and they say that it never occurred to them that the

parties were anything more to each other than friends. No evidence of other visitors is adduced; and it is certainly remarkable that if, as the pursuer suggests, Miss Hodgson came to the hotel in order that she and the defender might gratify their passions, there should be no direct evidence of the occupants of adjoining rooms in a public hotel, which was at the time well filled, to the effect that they were seen entering or leaving the same room, or were in it at the same time alone. What evidence there is is entirely that of the servants in the hotel, but it is only just to say that there was nothing in their demeanour to lead me to suppose that they were saying anything that they did not believe.

“The witness David Low says he formed the impression that the defender and Miss Hodgson were on very intimate terms; and that if he had not known that the defender was a married man he would have taken them for sweethearts or a honeymoon couple. On one occasion he saw them coming from the station arm in arm talking, and with their faces close together. On another occasion, when they went to the theatre, he remembers that orders were left by the defender that sandwiches should be taken to his sitting-room for him and a lady, that he himself set the table and took the sandwiches up and set plates for two. In cross-examination it turns out that this order was left with the head waiter, Rudolph Wilhelm, who has no recollection that two plates were ordered, although he recollects that sandwiches were to be taken to the defender's sitting-room. A witness examined on commission for the defender—Mrs Brymer—was at the time upper-chambermaid in the Queen's Bay Hotel, and she says that if sandwiches for two had been taken up by the waiter the night before to the sitting-room, it would have been her duty to remove the plates in the morning, and she has no recollection of such a thing having occurred while Miss Hodgson was there. I cannot therefore hold it proved that orders were in fact given by the defender for refreshments for two being taken to his sitting-room after the theatre.

Much more formidable evidence, however, is given by Macmillan, who was and still is the boots at the Queen's Bay Hotel. He remembers the defender saying about a week before Miss Hodgson arrived that he expected a lady friend; that he saw the meeting between them, and that they appeared to be, both at that time and later, on very friendly terms; that on several occasions he heard voices, which he identified as those of the defender and Miss Hodgson, in the defender's sitting-room in the evening; that on one or two occasions he tried the sitting-room door softly and found it locked; that the defender kept a photograph of Miss Hodgson in the sitting-room, and that on one occasion he found it on a chair at his bedside; and that after Miss Hodgson left, the defender wanted to occupy the bedroom which she had just vacated. Now if I could hold it proved by Macmillan's evidence that the defender

and Miss Hodgson actually were in his sitting-room more than once in the evening with the door locked and alone, I should feel myself obliged to draw the same unfavourable inference that he did. But Macmillan's evidence alone does not seem to me sufficient to establish this as a fact. The defender and Miss Hodgson explain that on three occasions she was in the sitting-room with him, but there were other persons present, and Low, who must have had just as good opportunities as Macmillan for observing, remembers these occasions, but is unable to say that there were others when the parties were alone together. Macmillan's evidence, besides, is open to criticisms. In his evidence-in-chief he says—“I have frequently seen Mr Bennet Clark and Miss Hodgson during their visit going together into Mr Clark's sitting-room after dinner.” Yet in cross when he is asked—“(Q) Did you see anything that suggested to you anything improper in the relationship between the two?” he answers—“Nothing improper. If I had seen anything improper no doubt it would have been my duty to report it.” He says also that he spoke at the time to Wilhelm, but he is flatly contradicted on this subject, and it must be remembered that it was not for nearly three years after the events occurred that Macmillan was asked to recollect what had taken place. It is possible in these circumstances that he may be mistaken, and that the occasions when he heard the voices as he passed the sitting-room door were those when Mr Trevor and others were also present. In any view, the evidence is absolutely uncorroborated, although other servants of the hotel had better opportunities than Macmillan of observing what took place.

As regards the story of the photograph in the bedroom, I think it is much more likely to have been taken there by some playful chambermaid than by the defender, and Miss Openshaw, who would have been the person to whom an application for a change of room would fall in ordinary course to be made, positively states that the defender never asked to be transferred to the bedroom Miss Hodgson had occupied. This story, besides, strikes me as intrinsically improbable, as the defender had previously occupied a sitting-room as well as a bedroom.

“The only other evidence of importance relates to the visit to the Dirleton Hotel, Harrogate, in October 1906. The evidence of Mrs Rymer and her daughter, however, do not add much to the admissions of the defender. After Miss Hodgson had left, Mrs Rymer by her instructions packed the clothes which she had left behind with the view of sending them after her. Amongst the clothes she came upon a letter which bore an Edinburgh postmark, and the address of which the servant identified as being in the handwriting of the defender. Out of curiosity Miss Rymer took out the letter in the envelope and read the commencement of the letter, which was ‘My darling little girlie,’ or ‘My dear little childie,’ or something of

that nature. She was then instructed to put back the letter, and never looked at the signature. I do not think it established by this evidence that a letter so addressed had in fact been received by Miss Hodgson from the defender, although that was the impression which the three women received, but which, unfortunately for the pursuer's case, they did not verify. I may say, however, that I regard the non-production of any samples of the correspondence between the defender and Miss Hodgson as tending to put their relations in a very unfortunate light, although I do not feel myself able to draw any positive inferences from the destruction of these letters. It is fair to add that the terms in which they addressed each other in these letters, and also the frequency with which they corresponded, on which the pursuer founds so strongly, depend entirely on the candid admissions of Miss Hodgson and the defender.

"The only other piece of evidence from Harrogate is supplied by Dr Wilson, who was called in on the morning that Miss Hodgson became seriously ill. He says that the defender was in the public sitting-room when he arrived, and that the lady was lying on the sofa with her stays loosened and her bodice unfastened, although she was not in any way exposed; that he assumed at first that the defender was her husband, and afterwards that he was her brother; that on this assumption he asked what were her symptoms in the presence of the defender; and ascertained that they were such as to necessitate an examination in her bedroom. This evidence and the subsequent constant visits of the defender to Miss Hodgson while she was lying ill, and when he behaved as a brother or a lover might be expected to do in showing her what attentions were possible, are highly significant as showing the intimacy which existed between the pair; and all the previous evidence must, I think, be viewed in the light of what we now know to have been the terms upon which the parties were. But any actual adultery during this visit or later may be said to be out of question, owing to Miss Hodgson's state of health; and it is not without importance that Miss Hodgson's sister and her mother, who may be presumed to have valued her reputation, did not think it at all remarkable that the defender should visit her in the home in Edinburgh or keep her supplied with such dainties as she required from time to time. Certainly these ladies had ample opportunities of forming an opinion as to the relations between the two, yet it seems never to have occurred to either that these were other than those of close friendship.

"In justice to the defender, I ought here to record the fact that he gave his evidence with great calmness, moderation, and apparent candour.

"On the whole matter, I have reached the conclusion that the evidence is not sufficient to justify a conviction of what is after all a *quasi* criminal course of conduct involving highly penal consequences, although I fully admit that the relations

of the parties were such that even an isolated act of undue familiarity or an association together in suspicious circumstances, if well proved, would have led me to a different conclusion. I shall therefore grant decree of absolvitor."

The pursuer reclaimed—The reclaiming-note was heard by the First Division (the Lord President, Lord M'Laren, and Lord Kinneir) on 7th July 1908 and following days, and on 17th July 1908 the Court ordered the case to be re-heard before a Court of five Judges. On 8th December 1908 and following days the case was re-heard before the Lord President and Lords M'Laren, Kinneir, Low, and Dundas.

Argued for reclaimer—The conduct of the defender and co-defender was inconsistent with innocence. The theory of innocent friendship was incompatible with their conduct at Queen's Bay Hotel, Joppa, and the Dirleton Hotel, Harrogate. *Esto* that there was no proof of familiarities, their regard for appearances was a cover for adultery. The evidence of the witness Macmillan received sufficient corroboration from the whole circumstances of the case. Trifling incidents were falsely denied, and that taken along with the facts of the case was sufficient corroboration of Macmillan's evidence—*Harper v. Paterson*, June 16, 1896, 33 S.L.R. 657; *Macpherson v. Largue*, June 16, 1896, 23 R. 785, 33 S.L.R. 615.

Argued for respondent—The Lord Ordinary was right. The reclaimer's theory of adultery over a long period was not supported by the facts of the case; the respondent's conduct was quite consistent with innocent friendship. That was the only basis on which it could be satisfactorily explained. The respondent's position was peculiar. He was unhappy and isolated, and his association with the co-defender was very natural. There were no remonstrances on the part of the lady's family to whom he was introduced, or on the part of any of her friends. There was not the slightest proof of acts of familiarity. The evidence of the witness Macmillan, relied on by the pursuer, was contradicted by other witnesses, and even if it were true it was not sufficient proof of adultery in the absence of other corroboration—*Robertson v. Robertson*, July 19, 1888, 15 R. 1001, 25 S.L.R. 708. Mere evidence of opportunity was not enough, there must also be evidence of guilty intention—*Fraser, H. & W.* p. 1157; *Harris v. Harris* (1829), 2 Hagg. Ecc. Cas. 376, at p. 379. There was no proof of such intention here, for no familiarities had been proved. The cases of *Bramwell v. Bramwell* (1831), 3 Hagg. Ecc. Cas. 618; *M'Iver v. M'Iver*, March 10, 1859, 21 D. 655; and *Walker v. Walker*, June 23, 1871, 9 Macph. 1091, 8 S.L.R. 586, were good instances in which an inference of adultery was justified. These cases were very different from the present. Here there was nothing except suspicion, and that was clearly not sufficient to justify the inference of adultery.

At advising—

LORD KINNEAR—This is an action at the instance of Mrs David Bennet Clark against her husband for divorce on the ground of his alleged adultery with an unmarried lady, Miss Elinor Hodgson. By way of support to his main ground of action the pursuer has introduced into the proof a variety of charges more or less irrelevant against her husband with reference to his conduct before marriage, and to certain dissensions between them which resulted in their separation in 1903. As to this part of the case, I content myself with referring to the opinion of the Lord Ordinary, with which I agree. But I have found the question really in issue to require much more serious consideration, and on that matter we are not relieved by the deference which is due to the Lord Ordinary of the responsibility of forming an independent judgment for ourselves, both because the difficulty does not arise from any conflict of testimony, but rather lies in the interpretation of facts which in themselves are sufficiently proved, and because the advantage which belongs to the Judge who has seen and heard the witnesses is in this case materially diminished by the examination of Miss Hodgson on commission instead of in Court.

I shall not think it necessary to examine the evidence in great detail, because the material facts are fully and correctly stated in the Lord Ordinary's opinion, but it is necessary to recal to your Lordships the material points in the evidence upon which it seems to me that the question must turn. The pursuer's case is stated in the 12th article of the condescendence, in which she avers that "the defender has carried on a continuous course of adultery with the said Miss Hodgson since the year 1904. In particular, the defender carried on a continuous course of adultery and committed adultery with the said Miss Hodgson (1) at the Edinburgh Hydropathic between 2nd and 30th August 1904; (2) at the said hydropathic between the 16th and the 23rd August 1905; (3) at the Queen's Bay Hotel, Joppa, between 31st August and the end of September 1905; (4) at the Cairn Hydropathic, Harrogate, between 4th and 13th August 1906; (5) at the Dirleton Hotel, Harrogate, between the 17th and 27th October 1906." There are therefore five definite averments of adultery at five different times and various places which the pursuer undertakes to prove. The stress of her case, however, as it was presented to us by her counsel, does not rest upon specific evidence of particular acts committed on any particular occasions, but on the combination of a variety of facts and circumstances in the conduct of the parties throughout, which according to the argument compels the inference that they were living in the practice of adultery during the whole of the period specified. This is a perfectly legitimate method, as the case of *Walker v. Walker*, 9 Macph. 1091, shows, but we must of course ascertain in the first place what particular facts are definitely proved in support of each of the five charges alleged before we proceed

to consider whether, taken separately or together, they are sufficient to justify the general inference of guilt which we are asked to draw, not as a fact proved by direct evidence but as an inference in fact from particular facts that are so proved.

The first of the five charges relates to the period between the 2nd and the 30th of August 1904, when the defender and Miss Hodgson are said to have been together at the hydropathic establishment at Craiglockhart. It appears that Miss Hodgson, who is the daughter of an English clergyman and lives with her widowed mother at Brighton, had agreed to meet two of her friends, General Allen and Miss Stirton, at Craiglockhart, and she joined them there on the 2nd of August. Some days later the defender arrived. He was introduced to the party, and soon came to be on friendly terms with all of them. He was at that time separated from his wife, and he says that he was suffering very great distress of mind in consequence of the rupture and also from nervous depression, and had been advised by his physician to go to Craiglockhart. Miss Hodgson, on the other hand, says that she had had some troubles in business, as to which when they came to be acquainted she found Mr Bennet Clark, the defender, was an excellent adviser. However that may be, there can be no question that each found the society of the other attractive and sympathetic, and that they saw a great deal of one another at the hydropathic. The defender was engaged in business during the day and went out to the hydropathic establishment in the afternoon, and the evidence is that he was much in the society of Miss Hodgson during the whole time; that he was in the habit of strolling about with her and of playing billiards with her in the common billiard room, and that they dined together with General Allen and Miss Stirton. The result of the whole evidence is to show that they formed a very close friendship, in the course of which they naturally were much in each other's company. But that appears to me to be the full result of the evidence as to this period. In short, as far as direct evidence is concerned, nothing whatever is proved to have taken place at this first period that we are considering that is not consistent with a perfectly innocent friendship, and even for that the only material evidence is to be found in the candid admissions of the parties themselves. The pursuer maintains that at least one definite fact tending to prove an undue familiarity is established by the evidence of a lad called Evan Paterson, who was examined as a witness. I am unable to give credence to his story, and if it were believed I cannot think that it is of any importance whatever. This witness was a lad of seventeen at the date of the proof, and was therefore only fourteen in 1904. He was employed as a lift boy at the hydropathic, and his statement, to which the pursuer attaches importance, is that he remembers that he on more than one occasion took Miss Hodgson and Mr Clark up in the lift together.

That in itself of course is of no consequence, but then he says that when he took them up in the lift Mr Clark, whose room was on the storey below that on which Miss Hodgson's room was situated, did not come off the lift at his own floor but went up to the top with her. He went up to the third or fourth storey where Miss Hodgson's room was, and this lad states that when they got up together to the level of Miss Hodgson's room they stepped from the lift into the corridor of that floor and proceeded to walk along that corridor. Now, I cannot attach importance to the evidence, even if the story were of any importance. This is the story of a boy of fourteen, and we are asked to accept his bare assertion when he is examined as conclusive evidence of the alleged fact. There is no evidence that anything happened which should have made such an impression upon his mind as to explain his distinct recollection of so trivial an occurrence after the lapse of three years, nor did it strike him at the time as so remarkable that he ought to report it.

He says that he talked about it to a fellow-servant called Black, but then the conversations were after these two people had been precognosed by the pursuer's agent, and the result of the whole story is simply to show that when the pursuer's agents were in search of evidence to support their case these two servants were set to hunt up their recollections for incriminating facts, and this story is all that comes of their research. I do not think we take it as proved, and I attach no importance whatever to it as tending to show any kind of impropriety on the part of the two people concerned. Nothing could be more natural or more ordinary in the course of life at a place like this hydropathic establishment than that such a thing should occur. The only use which evidence of this kind seems to me to serve is to put us on our guard against attaching too much weight to what is called impressions which are recalled after the lapse of years. It shows that nothing can be more easy than to put malevolent constructions upon the simplest or most imaginary appearances, and nothing could be more unsafe than to proceed upon stories of that kind as evidence. I think that is the only specific fact in relation to the residence in 1904 that is to be found in the evidence, except what I have already said, that there is abundant evidence, especially in the statements of the defender and Miss Hodgson themselves, that they had become friends during that time and were much in each other's company.

The evidence as to the second visit to the hydropathic establishment in 1905 adds very little to what is proved with reference to the first, but there is this difference, that during the second visit the defender Mr Clark was not resident in the hydropathic establishment, because he had applied for a room and had been told that he could not have one, and therefore his visits to the hydropathic while Miss Hodgson was there were the visits of a friend living

outside the establishment. But he did go there apparently with some regularity during the week that Miss Hodgson stayed, and was still, as before, a great deal in her society when he went. The reason why he did not have a room when he asked for it is said to be a relevant fact in the case, because it shows the impression which the conduct of the two parties made at the time upon a person who was in a position to judge of it, and who acted in the conduct of his own affairs upon his judgment, namely, Mr Bell, the manager of the hydropathic establishment. Mr Bell says that after Miss Hodgson had arrived Mr Bennet Clark applied for a room, and he was considering how he should find one for him, but on that evening an incident occurred to which he attached importance, and the pursuer does so now. He says—"The defender did not get the room. I went out after dark that night, and I found the defender and Miss Hodgson sitting at the extreme end of the upper grounds together, and I thought it extremely improper." And upon that opinion he says that he acted, by intimating to Mr Bennet Clark, not that he had observed anything improper in his conduct or in that of anybody else, but that he could not at the time find a room, and requesting him to delay his visit. Now as to the ground upon which Mr Bell came to this conclusion of impropriety, I must say it seems to me, from his own account, to be extremely shadowy. What happened was that he saw two visitors in the establishment, Mr Clark and this lady, sitting together on a bench in the grounds. He cannot say at what time this happened. He cannot say whether it was before or after dinner. He says nothing except that he saw it, and that he saw it, not because he was looking out for them, but because he happened to be strolling in their direction and came upon this meeting between these two people. They say—and there is no reason to distrust their evidence—that they were strolling about as other people did. They might have sat down or they might have been strolling, but they were simply doing what visitors to a hydropathic establishment ordinarily do upon an evening in September. I cannot say for myself that I see any ground for suspicion, or any ground for an unfavourable inference in the mere fact that they were so seen together. I do not suppose that Mr Bell would have attached importance to it—I mean speaking from the general effect of his evidence—were it not that he thought—and I do not say that he was at all wrong in thinking—that the defender's position as a married man living apart from his wife made it more incumbent upon him to show some reserve in his behaviour towards other ladies than he might otherwise have been expected to do. It was really the defender's position with reference to his own wife that suggested the unfavourable comments which Mr Bell is disposed to make upon what he saw. I think it material to point out, that whatever view he took at the time, he did not think it necessary or right to make any statement either to Mr Bennet

Clark or to anybody else imputing impropriety to him or to this lady. He made no statement at the time to them, and he made no report to anybody else, nor would the incident have become known at all had he not been cited to give evidence in this case. I can see nothing wrong on his part in saying nothing about his reasons for acting as he did to Mr Bennet Clark or the lady, because what he actually did implied no implication against either of them. He made no charge because he had no charge to make, only in the conduct of his own establishment he thought it would be well that he should not bring Mr Clark into the house while the lady was there. I do not think therefore that this adds any material fact to the body of facts which we are asked to consider, and from which we are to infer a guilty relation between these people. As regards the whole evidence applicable to both periods of residence in the hydropathic establishment, I am very clearly of opinion that beyond the innocent friendship which is admitted by the parties there is nothing tangible to suggest any impropriety of conduct or any unbecoming conduct on their part whatever. The whole evidence, if it can be so called, which is relied on by the pursuer for the purpose of supporting such a suggestion, appears to me to be mere petty gossip, chiefly the gossip of servants, to which no attention ought to be paid. Most of it comes to us at second-hand, and much of it is altogether irrelevant. In so far as it relates to the two persons whose conduct is in issue it is probably admissible although valueless as evidence, but I must say that I can find no justification for the introduction into this proof of much scandalous tittle-tattle about two other persons with whose conduct the defender had nothing whatever to do, and which can have no bearing whatsoever upon the question in issue.

“The third charge against the defender relates to the residence of both parties at the Queen’s Bay Hotel at Joppa between the 31st of August and the end of September 1905, but before considering the particular evidence applicable to that period it is proper to observe that the intercourse between the two had not ceased during the period between the first and second visit to the hydropathic, but had been continued so far as opportunities allowed during the whole period after they first made acquaintance in 1904 and down till the time when they met at the Queen’s Bay Hotel at Joppa. After leaving the Craiglockhart establishment in August 1904 the lady went to several other establishments successively of the same kind in Scotland, to Dunblane and to Peebles, and the defender Mr Clark constantly visited these places while she was there for the purpose of seeing her. As long as she remained in Scotland it would seem that he took every favourable opportunity for enjoying her society. When she left Scotland and went home to Brighton she proposed that they should correspond, and she invited him to pay a visit to her mother at Brighton at Christmas 1904. They accordingly did write, letters

to one another during the whole period after their parting in Scotland in 1904, and down till immediately before this action was raised they kept up a constant correspondence, writing sometimes twice a-week, at least once a-week, and that it was a perfectly friendly and even intimate correspondence there can be no question, from their own account of the matter. At Christmas 1904 Mr Clark went to Brighton and visited Miss Hodgson’s mother, and he repeated these visits frequently during the early part of the year 1906. He did not live in Mrs Hodgson’s house, but he put up at a hotel; but he generally lunched and dined at Mrs Hodgson’s, and he took walks in the course of the afternoon with Miss Hodgson. Sometimes they dined with friends, but the description of his visits is simply that of the visits of an ordinary friend to a family with whom he was intimate. There is no specific evidence of anything that could be called wrong or improper in the course of these visits, but there are two points upon which the pursuer relies, which arise upon the evidence both with respect to the correspondence and with respect to the visits to Brighton. It is said, and it is so far perfectly true, that the defender could only spend a day or a little more than a day at Brighton, and that he took the trouble to make the long journey from Edinburgh to Brighton in order to have the pleasure of spending part of a Saturday and the greater part of a Sunday in the society of this lady, he being obliged to return home on Sunday night; and that is said to indicate a warmth of feeling which is beyond anything that is consistent with ordinary friendship. I cannot say that I can attach much importance to that consideration. The defender says that he enjoyed the railway travelling; but whether he did or not, it is out of the question to suggest that a journey by express train from Edinburgh to Brighton presents such a formidable difficulty to a man under 50 that it is necessary to suppose the force of some overwhelming passion in order to account for it. He explains with reference to his visits to the hydropathic establishments where Miss Hodgson was staying in the autumn of 1904 that in consequence of his rupture with his wife his domestic position was unpleasant. He was alone of course as far as his own home was concerned, and he thought that his friends rather shunned his society, and accordingly it was a great pleasure to him to find that he had some friends with whom he could spend the week-end. All that is perfectly natural, and if the same thing led him to go to Brighton I can see nothing so very extraordinary in the circumstance as to necessitate the kind of inference which the pursuer says is unavoidable.

Upon the correspondence the point which the pursuer takes is a somewhat different one, and it finds some countenance in one observation of the Lord Ordinary, because it is said that these letters have been destroyed, and that that throws a very unfavourable light upon the defender’s case. The suggestion is that the letters must

have been destroyed because they would have disclosed something in the relation between these parties which they did not desire to be known, and which would have gone to support the pursuer's allegations. I cannot say that that either seems to me to be a point of much importance. There is no ground in the evidence for suggesting that the letters were destroyed in any special circumstances which can throw suspicion upon the grounds of their destruction. All that we know is that Mr Clark says he destroyed his letters as he received them, and Miss Hodgson says that she did not keep Mr Clark's letters. All that seems to me to be perfectly natural, and I am quite unable to draw any unfavourable inference against these persons from what appears to me to be the very common conduct of sensible people, who, receiving and interchanging letters which have no relation to business, and do not require to be preserved, destroy them as soon as they are received. Their destruction is suspicious only if we begin by assuming that there was something to conceal. And I think that the Lord Ordinary's observation upon this point is extremely important, when he says that all we know about these letters is derived from the candid statements of the defender and Miss Hodgson themselves. Unless they had volunteered the statement that they did correspond with one another, nobody would have known anything about it, and their evidence upon that subject is in no way unfavourable to them. The Lord Ordinary observes further that it is material to keep in view throughout the case that the defender gave his evidence with great calmness, moderation, and candour. Up to the date, therefore, of the visit to the Queen's Bay Hotel, I do not find any evidence of any actual facts which go to support the inference the pursuer asked us to draw in regard to the general relations of these two people.

With reference to the residence at the Queen's Bay Hotel, the point for the pursuer seems to me to lie in the mere fact that, in the circumstances which I have already explained, Miss Hodgson went there at all. Being there, the result of the evidence appears to be that she and the defender behaved in no other way than might be expected of reasonably well-conducted persons of different sexes who were on terms of friendship with one another and happened to meet one another at a hotel. The defender had been well known there for some time, and, according to the manager, had habitually associated with the other visitors and continued to do so after Miss Hodgson's arrival. He had in particular two friends in the hotel, Mr Mitchell and Mr Trevor, both of whom were men of business in good position, and presumably acquainted with the ways of the world, and their testimony is perfectly clear and unequivocal. They agree that the defender and Miss Hodgson mixed with the other guests, that none of the guests made any comment upon their behaviour, and that in fact there was nothing in it to

occasion comment. Their rooms were in different wings and as remote from one another as the arrangements of the house allowed. They dined at the same table in the common dining-room. They played billiards together in a billiard-room frequented by the other visitors, and on one occasion they went to the theatre together without other company. Miss Hodgson also visited the defender's sitting-room, but in company with Mr Trevor and some other persons, for the purpose apparently of seeing engravings and pictures belonging to the defender. There is nothing in all this in the least decree significant or suggestive of impropriety, but an incident of a very different kind is alleged, which, if we could take it as proved, would probably be fatal to the defence. That is the story of a witness called Macmillan, the boots of the hotel, who says that he had observed that Miss Hodgson on the evening of her arrival was in Mr Clark's sitting-room, that when he tried to open the door the door was locked, that he heard voices inside, that the lady's voice was the voice of Miss Hodgson, and that the other voice was that of Mr Clark; and therefore his evidence is that upon this occasion the defender and Miss Hodgson were together in Mr Clark's private sitting-room and the door was locked. I must say that I have some hesitation in accepting the bare assertion of a single witness as conclusive with reference to an isolated fact which must have such momentous consequences to the parties to a cause. But then, although this is introduced as if it were a single instance, it is not, according to Macmillan's evidence, really an isolated fact. It occurred frequently. According to my reading of the evidence, the same thing must have happened seven or eight times during the two weeks when Miss Hodgson and the defender were in the hotel together. There was therefore ample room for corroboration of Macmillan's statement, if it were capable of being corroborated. The other servants in the hotel had much better opportunities for seeing a thing of this kind than he had. Mr Mitchell, whose room was next door to Mr Clark's, had similar opportunities. The story is that Miss Hodgson must be supposed to have come from another wing of the house and to have penetrated into a part of the house where she had no occasion to be, in order to visit Mr Clark's sitting-room, where the two were locked up together. I think it in the highest degree improbable that, if this happened, it should have been seen by Macmillan alone and not by anybody else in the hotel. And, what is perhaps even more material, Macmillan's own evidence upon other points is flatly contradicted by the other servants in the hotel. He is contradicted by Miss Openshaw the manageress; he is contradicted by the head waiter Wilhelm, and cannot therefore be accepted as a witness whose bare word is sufficient to prove a fact of this materiality. I think it material that the Lord Ordinary, who did see this witness, although he did not see and hear Miss

Hodgson herself, does not give credit to Macmillan's story, and I do not think it can be accepted. If that be dismissed, there is nothing further in the evidence as to the Queen's Bay Hotel except the evidence as to the indications of intimate friendship, which is admitted by both parties.

The remaining two charges, which have reference to Harrogate, are in some respects in a different position. Miss Hodgson had been advised to go to Harrogate in August 1906. She went first to the Cairn Hydro-pathic establishment there, and afterwards, in October of the same year, went to a hotel called the Dirleton Hotel at Harrogate. Mr Bennet Clark, after endeavouring to obtain a room in the same hydro-pathic where Miss Hodgson was living, took a bedroom at the Dirleton Hotel, but visited the Cairn Hydro-pathic establishment and took his meals there, and was constantly in Miss Hodgson's society during that week. All that adds nothing to the previous evidence, except the fact, which is said to be material, that the same familiar and friendly intercourse continued between them. So far as regards Miss Hodgson's stay in the Cairn Hydro-pathic establishment at Harrogate in August, I see no further evidence that requires comment; but in October she went back there and took a room at the Dirleton Hotel, the hotel where Mr Bennet Clark had previously been living, and she expected that he would arrive there to meet her. But he was taken ill on the 6th of October, and she received a telegram that he was seriously ill and was lying in a home in Edinburgh and being treated for an attack of pleurisy. She came down to Edinburgh and visited him at this home. By the middle of October, I think the 17th, he was sufficiently recovered to travel, and he and Miss Hodgson went back to Harrogate and took up their residence at the Dirleton Hotel. The day after their arrival Miss Hodgson was taken ill, and so seriously ill that she felt obliged to leave Harrogate. She came down to Edinburgh to consult Sir Halliday Croom, and she took up her residence in a home in Forres Street, where she was medically attended by her physicians. There she remained until November 1906, and during this time she was constantly visited by the defender, as she had previously visited the defender himself when he was laid up, and the defender not only visited her but rendered all the services which might be expected of an intimate friend to a sick friend who was living in a strange place, bringing her beef essences and various things which were not supplied to her in this home in Forres Street, and in particular constantly communicating with reference to her condition with her mother in Brighton. That he was there and that he paid these visits as an intimate friend of the lady herself and of her mother, and that he behaved exactly as such a person might be supposed to do, appears to be the true result of the evidence. There is no suggestion that anything improper or immoral could take place either during the defender's visit to

the sick home in Edinburgh or during the lady's visit to the home in Forres Street. The relations between them were those of friends, and friends only—I mean as far as any evidence of their relations can be obtained. I do not see that there was anything more than what was natural in the defender's conduct in making these visits while Miss Hodgson was confined to this house.

There are, however, two circumstances on which the pursuer has relied, of which it is necessary to take notice, in connection with their residence in Harrogate, which ended in the way I have mentioned. In the first place, after Miss Hodgson had left, it is said that the landlady of the hotel at Harrogate and her daughter were by her instructions engaged in packing her clothes which were to be sent on to her, and that the daughter found a letter in an envelope which bore the Edinburgh postmark, and that she read the commencement of the letter, which began with the words "My darling little girlie" or "My dear little childie," or something to that effect; and the suggestion is that this was a letter from the defender addressed to the lady in terms which certainly would not be appropriate to the relation which they say alone subsisted between them. The young woman did not read much of the letter, because her mother very properly reprovved her and stopped the reading, and we know nothing about it except that they say that they think the postmark was Edinburgh, and that they think it began in the words that I have mentioned, or words of a similar kind. Mrs Suart, the defender's sister, says that these were words in which her mother was very apt to address her daughter, as would be very natural, but both the defender and Miss Hodgson deny that he ever used language of that kind to her in addressing her. It is to my mind quite impossible to accept this as evidence that the defender ever wrote such a letter. The signature was not seen, and there is no evidence that it came from him. The only suggestion that it must have come from him is that there was an Edinburgh postmark upon the envelope. Whether that is an exact recollection by witnesses who seem to have been somewhat hurried over their inspection of this letter I do not know, but it is quite insufficient to convict the defender of having written, or Miss Hodgson of having received such a letter from him. I think that incident therefore may be altogether dismissed. The other is of a different kind. When Miss Hodgson was taken ill, a doctor—Dr Wilson—was sent for, and he says that when he arrived he found the lady in a sitting-room lying upon a sofa, and that the defender was present in the room. It was not a private room but a public sitting-room, in a hotel in which at the time there seems to have been no other guests. The doctor says that finding this gentleman in the room when he was called upon to visit a sick stranger he assumed that he was the lady's husband, and afterwards when he found that he was not her

husband he assumed that he was her brother. That was no doubt a perfectly natural assumption on the part of the doctor. Both were strangers to him, and it was perfectly natural that when he found them together in the public sitting-room he should conjecture, if he made any guess upon the subject at all, that they were at least near relations. But that in itself implies no improper relation between them and was really of no consequence, because nothing happened in the defender's presence which would not have happened had the doctor been aware, as he was not aware at the time, that his patient and this gentleman were not related to one another. All that happened was that after some questions the doctor required that the lady should go to her own room in order to be examined. There was no kind of improper examination in the presence of the defender. Therefore the matter seems to me to be altogether trivial, but the pursuer makes a different kind of point upon it, and urges that the denial by the defender and Miss Hodgson of Dr Wilson's statement as to the defender's presence in the room is destructive of their credibility. Dr Wilson says the defender was in the sitting-room when he first came in. The defender says he was not, and Miss Hodgson agrees with him. The inaccuracy of men's memories is such that a contradiction of this kind suggests to my mind nothing like dishonesty on either side. But then it is said that the very triviality of the fact in controversy is an indication of a determination on the part of the two persons concerned to make up a story instead of giving straightforward and honest evidence as to what happened; and their denial of what Dr Wilson says was ingeniously connected with their similar denial of the lift boy's story at the hydro-pathic in Edinburgh, and it is said that when you find them denying every little thing, however trivial, that can possibly tell against them, you must infer that there is a designed scheme of denial running through their whole evidence, and that more material statements therefore are to be distrusted. I cannot say that this appears to me to be at all conclusive. It may very well be that these two people may have met some of the questions that were put to them with a peremptory denial when in other circumstances they might probably enough have thought it a sufficient answer to say that they did not recollect what they were asked about. That would in fact have been a perfectly sufficient answer with reference to this case as well as with reference to the lift boy's story. It was a thing that, being trivial in itself, they were not likely to recollect, but then I think also that great allowance must be made, considering the weight of a point of this kind, for the natural resentment which is occasioned by an extremely irritating form of cross-examination. Questions are put to this lady, and to the defender also, which carry with them an insulting suggestion, and, the obvious point of the question going beyond the ascertain-

ment of the fact and carrying with it a discreditable imputation, it is not unnatural that they should meet it with a much more peremptory denial than there might have been real occasion for if the fact alone had been the subject of an inoffensive question. On the whole matter, therefore, I am unable to see that there is any specific fact to be found in the evidence as to the relations of the two persons at Harrogate, or at the sick homes at which they were successively resident, which can raise any further inference of guilt than the evidence as to their previous residence at the hydro-pathic establishment at Craiglockhart and the Queen's Bay Hotel at Joppa.

As the result of the whole matter I think there is no room for question, as I have already said, that these two persons formed what the Lord Ordinary describes as a close friendship, that they took pleasure in each other's society, and that they lost no opportunity of enjoying it, even in circumstances in which the ordinary conventions of the class to which they belong might well have deterred them from coming together. Looking, as we are now able to do, at the whole course of the story from beginning to end, it is impossible not to see that the defender's habit of frequenting the successive hydro-pathic establishments where Miss Hodgson was visiting, and just because she was visiting there, was, to say the least, very indiscreet, and it was still more unwise for these two persons to come together as they did at the Queen's Bay Hotel and afterwards at Harrogate. But then I think the indiscretion arises from the tendency of their behaviour to create malevolent comment and suspicion. Whether we can hold that there was ground in fact for such comment and suspicion must depend upon their actual behaviour when they had met. I do not think that the defender can be acquitted of the charge the Lord Ordinary makes that he was not in the whole course of his behaviour sufficiently careful of the lady's reputation, which it was especially incumbent upon him to consider in consequence of his own position as living apart from his wife. So far as the lady herself is concerned, the conduct which may be called indiscreet was not only consistent with actual innocence but may be reasonably imputed to the consciousness of innocence on the part of a person who meant no harm, and who probably saw no harm in what she was doing, because those who were nearest to her and most interested in her welfare—her mother and sister—thought it was not harmful. It is a very material consideration that throughout all this course of visiting, upon which the whole case against her depends, her proceedings were perfectly well known to her mother. Her mother was quite aware that she was visiting these places, that the defender was her friend there and met her as her friend there, that she went to the hotel at Joppa, and that she went to Harrogate, where she was to meet the defender; and I think it is also, upon the

question of fact, a material point to observe that the mother's confidence seems to have been so far justified that there is absolutely no evidence, so far as I can find, of anything like improper or unbecoming conduct between these two people. If we accept the pursuer's theory, and assume that they were not only friends but they were moved throughout by a violent passion for one another, and in addition to that were utterly reckless of the ordinary conventions of society—for that is the pursuer's case—it is certainly remarkable that they are not detected in the whole course of the period during which they are living together in any sort of unbecoming or improper familiarity. It is to my mind extremely improbable that people of the character supposed, and with the disregard of ordinary rules of conduct with which they are charged, and so incapable as they are supposed to be of controlling their feelings, should have gone through these successive public establishments and hotels without betraying themselves by any single infringement of the rules of common decency and propriety as between two such persons.

It is said that we cannot assume that these people are in any way abnormal, and therefore we must draw the worst conclusions from the evidence as to their opportunities for misconduct, which were certainly many, but I confess I do not know what the normal standard is which is supposed to be thus beyond dispute. There are differences of disposition and character, and I suppose there is nothing in which women differ more widely from men, or from one another, than in their susceptibility to the passion which we are required to ascribe to both of these persons. If the proposition of the learned counsel for the pursuer means that there cannot be what is called a close friendship between a man and an unmarried woman without an immoral or a guilty passion, I am of the same mind with the Lord Ordinary, and I do not agree with it. The truth is that it is impossible to lay down general rules upon which to argue about the inscrutable emotions of persons of whom we know nothing except the facts which, *ex hypothesi*, are to be explained. We must go by what is proved, and I agree with the Lord Ordinary that it would be altogether unjust to draw an inference of guilt from facts which are not inconsistent with innocence. The Lord Ordinary's observation seems to me to be perfectly sound when he says that this is a case in which a decision against the defender would be not very different in kind, and would, so far at least as one of the parties is concerned, have just as ruinous an effect as a conviction upon a criminal charge. It is therefore indispensable that the case should be proved by unimpeachable evidence before we can find against the defender. I am of opinion that we ought to adhere to the Lord Ordinary's interlocutor, and that the reasons which he gives for it are sufficient and altogether sound.

LORD PRESIDENT—I feel bound to state that at the conclusion of the first hearing the impression I had formed was unfavourable to the interlocutor under review. It was not that I thought that there had been a sufficient proof of any specific act of adultery. Indeed, that could scarcely be argued, with the exception of the incident at the Queen's Bay Hotel, and the testimony as regards that incident seemed to me quite insufficient for very much the same reasons as have been explained by my brother Lord Kinnear. But I could not disguise from myself that the long series of studied opportunities which we have here would in the case of most people lead to but one result, and I doubted whether one had the right to refrain in this case from drawing an inference which certainly in the majority of cases would be right. This impression which I had formed did not leave me confident, for two reasons—in the first place, because it was disagreeing with the Lord Ordinary, who had had the advantage of himself seeing the witnesses; and, in the second place, because I found that this impression was not unanimously shared by those of your Lordships who with me participated in the first hearing. It was for that reason that I thought it right to order a second hearing of the case before a larger Bench. That second hearing, while I cannot say that it entirely removed my doubts, at the same time did attenuate them, with the advantage of the fuller analysis of the evidence which that second hearing afforded; and in the result I am able to say that I concur with the opinion just delivered. I should perhaps have had less trouble in making up my own mind if the Lord Ordinary here had seen the lady and examined her in Court. Unfortunately that was not so, because I believe that in a case of long continued intimacy like this, in the case of nearly all men, and certainly in the case of a man who is shown to demonstration by his own correspondence to be a person of peculiarly weak character—I think in such a case the moral fibre of the lady will in the long run be found to be the determining factor of the situation. But the paramount consideration which in the end has influenced me has been the absence of everything of the nature of what are generally denominated as familiarities. These two parties were subjected to a long course of observation, one might almost say of surveillance. No one has ever seen them even kiss each other; far less has there been any suggestion of their being surprised in a situation suggestive of improper relations. I think it quite impossible to suppose that, if they had really been living in a continued state of adulterous intercourse, as is alleged, they would not have indulged in some familiarities which somebody or other would have had the opportunity of seeing. To me this consideration has turned the scale, and therefore I agree with the judgment which has just been pronounced, which I believe to be also the opinion of the rest of your Lordships.

LORD M'LAREN—I have felt this case to be one of very great difficulty, and while I do not propose to attempt a separate analysis of the evidence, because I am perfectly satisfied with the statement of the facts made by Lord Kinnear, I am rather disposed to accept the view of your Lordship in the chair in regard to the qualified nature of the conclusions that I draw from these facts. The acquaintanceship that the parties formed at Craigmlockhart Hydropathic, under circumstances which I do not need to characterise, I think very soon developed into a warmer feeling, and indeed I do not need to go further, because it is consistent with the argument of counsel on both sides of the bar that even if there was a romantic passion subsisting between the parties—and I think the fact that the parties were in almost daily correspondence and the frequent visits of the defender to Brighton showed that such was the character of the intimacy—the existence of such a passion might be a very important element in an action of separation, but it is only of subsidiary account in an action of divorce, and it is not of determining importance unless we have evidence, or equivalent inferences from facts to supplement it. Now, I pass over not only the incidents at the hydropathic, but also those at the hotel near Portobello which are founded on in support of the pursuer's case, because I think the result of the whole of that evidence is that nothing is proved on which a decree of divorce can be pronounced. But I confess I have had more difficulty with reference to the visits of the parties to Harrogate, because, although on the first occasion there is certainly this to be said in their favour, that they proposed to go to a hotel where there were other visitors and where they would be under observation, yet on the second occasion I think it must be admitted that the arrangement was that they should meet in a small hotel where they would be the only or almost the only occupants; and although the illness of the lady prevented that arrangement being carried out, yet they were there at all events for one day and night before the lady's illness supervened. The fact that the correspondence has been destroyed has made it extremely difficult for me to come to a definite conclusion in the case, although, for reasons which I shall state, I have satisfied myself that the judgment of the other members of the Court is the safe and the right conclusion.

In stating my reasons, I make *two* general observations. One is that mere opportunity, apart from other considerations, is absolutely immaterial in proceedings of this kind, because we know that in every relation of life constant opportunities exist. One need only refer to the relations of a master to a servant, whether in domestic life or in business or trade, where of course there are constant opportunities of intercourse with persons of the other sex; but then I must add this qualifying observation, that where the opportunity is not the result of some social or business relation

which gives an innocent complexion to incidents that might otherwise be the subject of observation, and especially where a lady abandons the restraints that are imposed by social usage, and risks the consequent damage to her reputation, it is fair to conclude that she must have some indirect motive adequate to account for her actions. But then this conclusion may be displaced either by proof that actual intercourse was impossible, or extremely improbable in the circumstances, or that in the particular case the relaxation of social restraint was more apparent than real. Now, both these considerations are of importance in the present case. If I were to look back fifty years, and if I were then considering a case like the present, I should most probably have come to the conclusion that the action of Miss Hodgson in going to Harrogate to meet the defender, as sole occupants of the hotel, was inconsistent with innocence. But the difference in my conclusion in the year 1859 and the conclusion at which the Court has arrived in the present case, and in which I concur, would not depend entirely on legal experience. It would be the result of the change that has occurred in the course of half a century in the social habits of the country, and especially in a notable relaxation of restraints which were formerly put upon the actions of women, and which are no longer supposed to be necessary for their protection. It is impossible to ignore the fact that at the present day a very large number of ladies of the most undoubted reputation are in the habit of travelling about unattended, or with no attendance except that of a domestic, and of spending much of their time at hotels or pensions abroad, and in such circumstances they necessarily meet on terms of familiar acquaintanceship both men and women who are occupiers of hotels or similar establishments. I think therefore that we are not entitled to look on the actions of Miss Hodgson in spending a great part of her time in such places as anything contrary to modern usage, or such as would necessarily expose her to suspicion. While I quite feel that the circumstances of the arranged meeting at Harrogate are peculiar, I do not think that, having regard to the greater liberty enjoyed by unmarried women at the present day, I should be safe in drawing a conclusion of guilt from that single circumstance. And then, again, a second exception comes in, the very great difficulty of supposing that intercourse could occur. We see that the parties arrived at the hotel at Harrogate at a late hour, and next morning the lady was so seriously ill that a doctor was called in, and she was sent to a home in Edinburgh. Well, all this raises a totally different inference from what I should have been disposed to draw if the lady had not been taken ill, and if the visit had been prolonged for several days or weeks. Considering the comparative seclusion in which the parties were living at Harrogate, that distinguishes this part of the case from the part of the case which deals with the visits

to Craiglockhart. In all the circumstances I have come to the conclusion that the pursuer's case is not proved.

LORD LOW—It is plain that an unusually close friendship existed between the defender and Miss Hodgson, a friendship indeed so close that being man and woman they might perhaps be described rather as lovers than as merely friends. It does not, however, follow that their relations were immoral, nor does it seem to me that there was anything in the character or history of either of them to render it antecedently incredible, or indeed improbable, that the pleasure which each found in the companionship of the other should be the explanation of their frequent meetings and constant correspondence.

When the defender met Miss Hodgson he was advancing in middle life; he was a lonely man whom circumstances had apparently cut off to a large extent from social intercourse with those among whom he lived; and in recent years the conduct of his wife had caused him much distress and not a little humiliation. It therefore seems to me to be quite intelligible that he should value very highly the affectionate friendship of a sympathetic woman.

In regard to Miss Hodgson, although she was a young woman she was past her first youth, and she seems to have been a lady of independent and self-reliant character who was in the habit of travelling about alone and staying at hotels and hydropathic establishments. Like the defender also, she seems to have been somewhat depressed at the time of their first meeting, a marriage engagement which she had contracted having turned out badly. She accordingly confided her troubles to the defender, and he confided his troubles to her. It therefore seems to me that the situation was one which might very well result in a close and affectionate friendship between the two, and nothing more. I think that it must also be remembered that for a woman, especially of the class to which Miss Hodgson belongs, there is a very long and serious step between the closest and most familiar intimacy with a man and the surrender of her body to him.

It was, however, argued with great force by the learned counsel for the pursuer that no reasonable explanation of the conduct of the defender and Miss Hodgson, when viewed in the light of the common experience of mankind, could be given except that the relationship between them was that of paramours. I propose, therefore, to consider briefly the main grounds upon which that contention was founded.

In the first place, it was argued that the evidence of the defender and Miss Hodgson was discredited because they both swore—contrary to the obvious fact—that they were no more to each other than ordinary friends; and because although they were perfectly frank in regard to what they did up to a certain point, they both, when an incident established by the evidence was put to them, which might in itself be consistent with innocence, but might, when

taken along with surrounding circumstances, be incriminating, met it with a flat denial. There is no doubt some foundation for that argument, but I do not think that untruthfulness has been proved of a kind or extent on the part of the defender and Miss Hodgson which altogether discredits their evidence, although there is sufficient to render it necessary to receive it with caution. I can, however, understand that, even assuming them to be innocent, their natural impulse would be to minimise as much as possible the warmth of their attachment to each other; and after all, the issue which they had to meet was whether the relationship between them was friendship—albeit an unusually close and intimate friendship—or illicit love. In regard to their denial of incidents spoken to by other witnesses, I am not satisfied that these incidents can be regarded as actually proved. Take, for example, two incidents which were founded on. The hall porter at Craiglockhart says that on one occasion he saw the defender and Miss Hodgson go upstairs arm in arm, and the lift boy says that once or twice the defender, when going up in the lift along with Miss Hodgson, allowed himself to be carried to a higher floor than that upon which his room was situated. One would have thought that in an establishment in which hundreds of guests are entertained during the season, such trifling incidents would have made no impression upon the memories of the porter and the lift boy. Yet they come forward years afterwards and swear that such things occurred. I confess that that is a kind of evidence which I regard with great distrust. My impression, however, is that in positively denying that such incidents ever happened the parties were sometimes not altogether frank. If they had said that they did not remember of such things happening, their evidence would not have been open to criticism.

There is, however, one incident of the kind which I am now considering which merits special notice. I refer to Dr Wilson's meeting with the defender and Miss Hodgson in the public sitting-room of the Dirlleton Hotel at Harrowgate, when he paid his first professional visit to the latter. Miss Hodgson denied that upon that occasion she was in the sitting-room with the defender, but it is evident that what she was referring to when she said that, was the medical examination which Dr Wilson made in her bedroom. The defender, on the other hand, said that he did not recollect that he and Miss Hodgson were in the sitting-room together when Dr Wilson called. I think that the incident was one which the defender might have been expected to remember, but I am not prepared to say that he must have been equivocating when he said he did not remember it. I was also impressed by Mr Hunter's argument, namely, that the incident was one which was likely to impress Dr Wilson more than the defender or Miss Hodgson. Dr Wilson very naturally assumed at first that the defender and Miss Hodgson were husband and wife, and

when he found that he was wrong in that surmise, he took them to be brother and sister, and again finding that that was not the case, he was puzzled to know what their relations were. The incident therefore impressed itself upon his memory as being something unusual, whereas the fact that before he examined Miss Hodgson in her bedroom he happened to see her in a public sitting-room where the defender also was, was so unimportant a matter from the point of view of the defender and Miss Hodgson that they may quite well have forgotten it.

The pursuer also founded upon Dr Wilson's evidence to the effect that Miss Hodgson, who appears to have been in great pain and was lying upon a couch, had the front of her dress and her stays unfastened. I understand Dr Wilson, however, to say that her dress was not visibly disarranged, and there is no reason to suppose that there was anything improper or indelicate in her condition. It therefore seems to me that the incident cannot be regarded as indicating that improper relations existed between the defender and Miss Hodgson, but only as bearing on their credibility, and for that purpose I do not think it is entitled to much weight.

The pursuer's counsel founded in the next place upon what is undoubtedly the strength of his case—namely, the way in which the defender and Miss Hodgson arranged to meet and live in hotels alone, and not, as was the case, for example, at Wemyss Bay and Peebles, as members of a party. The important instances are the visit to the Queen's Bay Hotel, Joppa, and the visits to Harrogate. The mere fact, however, that the parties visited these places, obviously with the express object of being together, does not seem to me in itself to warrant the inference that the relations between them were immoral. It, however, raises such grave suspicion that that was the case, that not very much in the way of facts and circumstances pointing in the same direction would be sufficient to change suspicion into an inference of guilt so strong and direct that the Court could not avoid giving effect to it. The question, therefore, is whether such facts and circumstances have been proved? There is one witness, and in my opinion one witness only, whose evidence, if it could be accepted as reliable, would probably incline the balance against the defender. I refer to Macmillan, the boots at the Queen's Bay Hotel. He says that he frequently saw the defender and Miss Hodgson go to the private sitting-room of the former in the evening after dinner. He afterwards says that he saw that happen half a dozen times "or more." He also says that on two occasions he heard them in the sitting-room and found that the door of the sitting-room, and also the door of the bedroom which opened off it, were locked. He therefore, according to his evidence, saw the parties enter, or found them locked into, the defender's sitting-room upon at least eight occasions, and I think it may be assumed that if that be true there must

have been other occasions when Miss Hodgson accompanied the defender to his sitting-room when Macmillan did not happen either to see or hear them. Therefore, seeing that Miss Hodgson only stayed at the hotel for from two to three weeks, the inference from Macmillan's evidence seems to be that the parties made a practice of going to the sitting-room in the evening. But if so, one would have expected that someone in the hotel besides Macmillan would have seen them going to the sitting-room or would have been aware that it was their habit to do so. Macmillan himself says—"Other servants must have seen them as well as myself." But, so far as appears, none of the other servants ever saw Miss Hodgson going to, or in, the defender's room except Mrs Brymer, who was the chambermaid, and who saw Miss Hodgson in the defender's sitting-room on one occasion (to which I shall refer presently) with two other gentlemen—an occasion, I may remark, to which Macmillan does not speak. Miss Openshaw, the manageress of the hotel, says that she never saw or heard of Miss Hodgson going to the defender's room, and the waiter Wilhelm says the same thing. Further, there were two Edinburgh gentlemen, Mr Mitchell and Mr Trevor, who were acquaintances of the defender, and who were staying in the hotel at the time, and they say that on one occasion the defender asked them to accompany Miss Hodgson to his room, as he wished to show her some prints. That is the occasion to which Mrs Brymer speaks. Apart from that occasion these gentlemen say that they had no reason to suspect that Miss Hodgson ever went to the defender's room, and upon that point I think that Mr Mitchell's evidence is especially valuable, because he had a sitting-room and bedroom adjoining those occupied by the defender. Further, Macmillan says that he told the waiter Wilhelm about Miss Hodgson being in the defender's rooms with the doors locked, but Wilhelm denies that he was told anything of the sort. Macmillan's evidence is therefore entirely without corroboration, although, if the story he tells be true, it is difficult to believe that he alone of all the people in the hotel knew of what was going on.

There are other respects in which it seems to me that Macmillan's evidence is open to criticism. For example, he says that when Miss Hodgson left the hotel, the defender (I quote Macmillan's words), "wanted the room that this lady had had, but was refused." The evidence of Miss Openshaw shows that there was no truth in that statement, and yet Macmillan made it positively, and as a matter of fact. Again, he says positively that after dinner the defender and Miss Hodgson sometimes went out cycling together. They admit that they sometimes did so before, but not after dinner, and it is unlikely that in the end of September and beginning of October they should have gone cycling between eight and nine o'clock at night. I think that it would have been noticed if they had done so, but here again Macmillan stands

alone. For these reasons I regard Macmillan's evidence as being unreliable, and I am unable to attach any weight whatever to it.

There is, however, another incident which occurred at the Queen's Bay Hotel which is not without importance. In regard to the occasion upon which the defender asked Mr Mitchell and Mr Trevor to accompany Miss Hodgson to his room, Mr Trevor's evidence is that the defender came to him after dinner and said—"Miss Hodgson is very anxious to see my Raeburn prints. You know how I am situated, will you come?" I said 'Yes.'" Then Mr Trevor says that when they came to the sitting-room Miss Hodgson said—"Is this the room I have never been allowed to see?"

Now, I cannot think that, assuming the relations between them to have been innocent, there would have been any impropriety in the defender taking Miss Hodgson to see his prints, and therefore there is room for the suggestion that what the defender and Miss Hodgson respectively said to Mr Trevor was really a blind intended to suggest that they were on somewhat formal terms with each other. I think, however, that to take that view would be to overstrain what actually occurred. The defender and Miss Hodgson cannot but have recognised that to live for weeks in the same hotel was apt to give rise to unpleasant conjectures; and indeed Miss Hodgson in her evidence says that she knew it was "not very wise" of her to go to Queen's Bay Hotel. It was therefore quite natural that she and the defender should be extremely careful to do nothing which might give occasion for scandal, and they certainly were in fact very careful, because if Macmillan's evidence be set aside I cannot find that during the whole period of their acquaintance they said or did anything which can properly be regarded as compromising, apart from the broad fact that they were constantly making opportunities of being together. Now, of all the places which they visited I think that Queen's Bay Hotel was the one where the need of circumspection was most apparent. The hotel was near Edinburgh, and it had been practically the defender's home for the best part of a year, and he, and presumably his story, were well known there; and further, two Edinburgh men of business who knew him were staying in the hotel. It was therefore intelligible, and consistent with the course which they adopted throughout, that the defender and Miss Hodgson should have been careful that while they were at the hotel they should meet only out-of-doors or in the public rooms, and should not be together in the defender's private sitting-room except in the presence of a third party. But if that be, as I think it is, a reasonable explanation of what was said by the defender and Miss Hodgson to Mr Trevor, the incident cannot be regarded as a circumstance from which guilt on their part can be inferred.

I shall not detain your Lordships by going into the details of the visits to

Harrogate in October 1906, except to say a word in regard to the second visit, when the defender and Miss Hodgson were the only guests at the Dirleton Hotel. No doubt that circumstance gave them the most ample opportunity, but, as I have already indicated, opportunity alone is not, in my judgment, sufficient, and nothing happened during that visit which could be regarded as incriminating, unless it were what occurred when Dr Wilson first called to see Miss Hodgson, an incident upon which I have already expressed my opinion. But the pursuer's counsel dealt with this part of the case as if the parties had designedly selected an hotel at which they were the only visitors. I cannot find any evidence that that was the case. Probably, considering the time of the year, they would not expect to find many visitors at the hotel, but I do not see how they could have counted upon there being none at all. That there were in fact no other visitors appears to me to have been a mere accident, and, except that the result was to give the defender and Miss Hodgson better opportunity, the circumstance does not appear to me to be in itself of much importance.

Another matter to which it is right to refer is the fact that not one of the innumerable letters passing between the defender and Miss Hodgson has been recovered. That fact does give rise to the suspicion that they destroyed letters in view of the present action. It is not, however, proved that they did so, and it cannot be assumed that they did so, nor that the letters, if they had been available, would have been incriminating. Further, I do not think that it is at all incredible that neither of the parties should have kept the letters. The defender had no settled home, and had probably no suitable repository in which to keep a mass of letters of no special importance, and one can understand that he would not leave lying about letters which, if not incriminatory, were almost certainly of a kind which he would not like others to see. Very much the same thing may be said in regard to Miss Hodgson. Therefore, although the fact that no letters at all were forthcoming is suspicious, and is a circumstance to be kept in view, I cannot draw from it with any certainty the inference that letters were destroyed when this action was brought because of the sinister light which they would have thrown upon the relations between the parties.

Further, there are certain circumstances which appear to me to be clearly in favour of the defender. In the first place, there is the fact, to which I have already alluded incidentally, and to which I attach great importance, that in the long period during which the defender and Miss Hodgson were constantly meeting each other no endearments or familiarities were ever seen to pass between them. If, however, their relations were improper it is almost impossible to believe that such things did not occur, but if they did occur it is very remarkable that, however careful the parties may have been, they were never

found in a situation which suggested undue familiarity. If they were guilty, they must not only have used quite exceptional care and self-control, but must have been exceptionally fortunate in avoiding observation.

In the second place, there was nothing clandestine in the conduct of the defender and Miss Hodgson. They did not resort to obscure places where they were unlikely to be known or to meet people who knew them, and there was no assumption of false names, or misrepresentation in regard to their connection with each other. Again, there was no concealment from Miss Hodgson's family of the friendship which she and the defender had contracted. On the contrary, the defender constantly went to see Miss Hodgson at Brighton when she was residing there with her mother, and he was received by the latter into the family circle. Then when Miss Hodgson was staying with her sister (who is Lady Superior of an English Church school) at St Albans, the defender went to see her there. Finally, when Miss Hodgson was seriously ill in Edinburgh, and unable to write to her family, it was the defender who kept them constantly informed of her condition. A letter from Mrs Hodgson to the defender, dated 17th February 1907, has been produced in which she thanks him for his kindness to her daughter. It was suggested that that letter was written with a purpose after the present proceedings had been threatened. I do not think that there is any ground for that suggestion, nor do I see any reason to doubt the good faith of the letter. But if the letter was written in good faith it shows that it had never occurred to Mrs Hodgson that there was anything wrong in the friendship between the defender and her daughter.

For these reasons, I am of opinion that the pursuer has failed to prove her case, and that the interlocutor of the Lord Ordinary should be affirmed.

LORD DUNDAS—After listening to the able arguments of counsel, and considering the case with all the attention that its inherent difficulty and its great importance to the parties demanded, I formed a decided view that the Lord Ordinary's judgment was right. I subsequently had the advantage of being allowed to read the opinion which has just been delivered by my brother Lord Low, and as I entirely concur in that opinion it would be mere waste of time if I were to proceed to state any further or other views of my own. I content myself by saying that I agree with all your Lordships in thinking that the pursuer has failed to prove her case.

The Court adhered.

Counsel for respondent moved for the expenses of the reclaiming note.

Counsel for claimer opposed the motion. He argued—The opinions just delivered showed that in the opinion of the Court the respondent had acted very indiscreetly and that his conduct was open to grave suspicion. In these circumstances he should

pay part of the costs: *Edward v. Edward and Jenkinson*, July 12, 1879, 6 R. 1255; *Campbell v. Ritchie & Co.*, June 22, 1907, S.C. 1097, 44 S.L.R. 786. Alternatively, neither party should get expenses: *Ewart v. Brown*, Nov. 10, 1882, 10 R. 163, 20 S.L.R. 105.

LORD PRESIDENT—In this case expenses are asked for by the successful party, but are opposed upon the ground that there was sufficient suspicion in what the defender here did to disentitle him to get his expenses as against the pursuer. It is not contended, and could not be contended, that it is not competent to grant expenses against the pursuer, because it is admitted that she possesses independent means. Indeed, we know from the proof that she has far more means than the defender. I think that the expenses ought to be allowed in ordinary form, and for this reason, that the considerations which were urged were, I think, perfectly appropriate considerations in the Outer House when the case was first disposed of, where indeed to a certain extent it was entertained by the Lord Ordinary, who did not give the successful defender full expenses but only half expenses. But the expenses which are now being dealt with are the expenses of the reclaiming note. Now the matter of the proof being over, and the defender's folly having been, so to speak, already visited upon him in the matter of expenses, all he does here is to come and defend his judgment. If he does that with success I think we must follow the ordinary rule.

LORD M'LAREN, LORD KINNEAR, LORD LOW, and LORD DUNDAS concurred.

The Court found the respondent entitled to the expenses of the reclaiming note.

Council for Pursuer (Reclaimer)—Clyde, K.C.—M'Clure, K.C.—Munro. Agents—Macpherson & Mackay, W.S.

Counsel for Defender (Respondent)—Hunter, K.C.—R. S. Horne. Agents—Mackay & Hay, W.S.

Friday, March 12.

FIRST DIVISION.

[Lord Kinnear and a Jury.]

KEENEY v. STEWART.

Process—Jury Trial—Refusal to Withdraw Case from Jury—Bill of Exceptions—Competency.

The refusal by the presiding judge to withdraw the case from the jury is not a wrong direction in law, and cannot competently be reviewed by way of Bill of Exceptions.

Road—Street—Reparation—Negligence—Defect in Pavement—Ventilating Trap—Failure to Prove Fault on Part of Owner of Pavement—New Trial.

A pursuer alleged that while proceeding along the pavement of a public